79-969

Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

LAWRENCE KRASNY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MANATT, PHELPS, ROTHENBERG & TUNNEY,
BRIAN J. O'NEILL,
MARC MARMARO,
LOUIS A. SPOTO,
1888 Century Park East, 17th Floor,
Los Angeles, Calif. 90067,
(213) 556-1500,
Attorneys for Lawrence Krasny, Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Citations to Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions 2

Statement of the Case 3

Statement of Facts 5

Reasons for Granting the Writ 8

A. The Larrison Test Applied by the Majority of Circuits Is Most Appropriate in Resolving Rule 33 Motions Based on Newly Discovered Evidence of Perjury by a Key Government Witness and Is Mandated by This Court's Prior Decisions 9

(1) Where Perjury of a Key Government Witness Is Involved, Defendant Need Only Show a Possibility of Acquittal in Order to Obtain a New Trial 9

(2) Where This Court Disagrees With the District and Circuit Courts' Conclusions as to the Legal Effect of the New Evidence, It May Dispense With Remand and Order a New Trial 11

(3) The Undisputed Evidence of Worley's Perjury Is Material as a Matter of Law in This Instance 13

(4) The Majority Rule Should Be Adopted by This Court 20

Page

B. The Ninth Circuit Majority Opinion Fails to Give Due Regard to Certain Salutary Features of the Larrison Test and to the Decisions of This Court in Virtually Indistinguishable Cases 25

C. The Dissent Correctly Sets Forth the Proper Standard and Should Be Adopted by This Court as Dictated by Its Prior Decisions 30

D. Conclusion 34

Appendix A. Opinion .....App. p. 1

Ely, Circuit Judge (Dissenting) 14

Appendix B. Order 17

Appendix C. 18

Appendix D. Order Recalling Judgment 19

TABLE OF AUTHORITIES CITED

Cases Page

Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 76 S.Ct. 663 (1956) ..20, 24

Kyle v. United States, 297 F.2d 507 (2d Cir. 1961) 23, 26

LaFever, Inc. v. All-Star Ins. Corp., 571 F.2d 1367 (5th Cir. 1978) 22

Larrison v. United States, 24 F.2d 82 (7th Cir. 1928) .....9, 11, 12, 21 .....22, 24, 25, 26, 27, 28, 29, 30, 34,

Martin v. United States, 17 F.2d 973 (5th Cir.), cert. denied, 275 U.S. 527 (1927) 22

Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1 (1956) 8, 9, 13, 15, 16, 20, 24, 31, 32, 33, 34

Newman v. United States, 238 F.2d 861 (5th Cir. 1956) 22

Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425 (1956) 13

United States Ex Rel. Sostre v. Festa, 513 F.2d 1313 (2d Cir. 1975) 22

United States, In Re, 565 F.2d 172 (1st Cir. 1977) 22

United States v. Anderson, 165 U.S. App.D.C. 390, 509 F.2d 312 (1974), cert. denied, 420 U.S. 991, 95 S.Ct. 1427, 43 L.Ed.2d 672 (1975) 21

United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) 23

United States v. Briola, 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 688 (1973) 22

Page

United States v. Chisum, 436 F.2d 645 (9th Cir. 1971) 30

United States v. Curran, 465 F.2d 260 (7th Cir. 1972) 22

United States v. Dipp. 581 F.2d 1323 (9th Cir. 1978) 26, 28

United States v. Gabriel, 597 F.2d 95 (7th Cir. 1979) 22

United States v. Hamilton, 559 F.2d 1370 (5th Cir. 1970) 22

United States v. Jackson, 579 F.2d 553 (10th Cir. 1978) 22

United States v. Johnson, 327 U.S. 106, 66 S.Ct. 464 (1946) 31

United States v. Johnson, 487 F.2d 1278 (4th Cir. 1973) 21

United States v. Maclin, 561 F.2d 958 (D.C. Cir. 1977) 22

United States v. Mele, 462 F.2d 918 (2d Cir. 1972) 26, 28

United States v. Meyers, 484 F.2d 113 (3d Cir. 1973) 21, 27

United States v. Miller, 411 F.2d 825 (2d Cir. 1969) 13, 23

United States v. Robinson, 585 F.2d 274 (7th Cir. 1978) 22

United States v. Runge, 593 F.2d 66 (8th Cir. 1979) 22

United States v. Smith, 433 F.2d 149 (5th Cir. 1970) 22

Page

United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976) 8, 18, 21, 22, 23, 24, 25, 26, 27, 29

United States v. Strauss, 443 F.2d 986 (1st Cir.), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971) 22

United States v. Wallace, 528 F.2d 863 (4th Cir. 1976) 22

United States v. Willis, 467 F.Supp. 1111 (N.D. Pa. 1979) 27

Williams v. United States, 500 F.2d 105 (9th Cir. 1974) 33

Rules

Federal Rules of Criminal Procedure, Rule 15 ..3, 4

Federal Rules of Criminal Procedure, Rule 33 ....2, 3, 4, 6, 9, 16, 31, 32

Rules of the Supreme Court of the United States, Rule 19 .....8, 9, 35

Statutes

United States Code, Title 21, Sec. 841(a)(1) 3

United States Code, Title 21, Sec. 846 3

United States Code, Title 21, Sec. 952 3

United States Code, Title 21, Sec. 963 3

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Fifth Amendment 2

Textbooks

8A Moore's Federal Practice, para. 33.03[1] ..9, 10

8A Moore's Federal Practice, para. 33.03[4] 13

Page

8A Moore's Federal Practice, para. 33.04[1] 13, 14, 24, 29

8A Moore's Federal Practice, para. 33.06[1] 12, 16, 28, 32

2 Wright, Federal Practice and Procedure, Sec. 557, pp. 524, 525 28

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

LAWRENCE KRASNY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Lawrence Krasny prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 27, 1979, with respect to which an order denying petitioner's petition for rehearing and suggestion for rehearing *en banc* was entered on November 20, 1979.

Citations to Opinions Below.

The judgment of the Court of Appeals is reported at .... F.2d ..... Said opinion is printed and attached hereto and made a part hereof as Appendix "A". The denial of petitioner's petition for rehearing and suggestion for rehearing *en banc* is printed and attached hereto and made a part hereof as Appendix "B".

Jurisdiction.

The Court of Appeals vacated the district court's denial of petitioner's motion under Rule 33, Federal Rules of Criminal Procedure, for a new trial on the basis of newly discovered evidence of perjury by the key prosecution witness on September 27, 1979, and remanded for further proceedings. On November 20, 1979, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

All questions raised in this Petition were raised in the court below and on appeal to the Court of Appeals for the Ninth Circuit.

Question Presented.

Whether the district court—by requiring petitioner to show, *inter alia*, that the jury *probably* would have acquitted petitioner had it been presented with unperjured testimony by the prosecution's key witness, and in so doing rejecting the majority rule that in such cases petitioner merely show that the jury *might* have acquitted (*i.e.*, show a *possibility* of acquittal)—applied the correct test to petitioner's motion for a new trial based on newly discovered evidence of perjury by the key government witness.

Constitutional and Statutory Provisions.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides: "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

The statutory provision involved is Rule 33, Federal Rules of Criminal Procedure, 28 U.S.C. Rule 33 is printed and attached hereto and made a part hereof as Appendix "C".

Statement of the Case.

On September 22, 1977, a two count indictment was filed charging petitioner, co-defendant Gary Bennett ("Bennett") and unindicted co-conspirator Gloria Worley ("Worley") with conspiracy to import heroin into the United States and to possess heroin with the intent to distribute it in violation of 21 U.S.C. §§841(a)(1), 846, 952, and 963.

Because the government's case rested almost exclusively on the testimony of Worley as to petitioner's prior knowledge, intent, and relationship with Bennett and Worley, and because a teletype summary of a Drug Enforcement Administration agent's interview of Bennett (who was incarcerated in Bangkok, Thailand) indicated that Bennett had made a statement exculpating petitioner, on October 14, 1977, petitioner moved to take the deposition of Bennett under Rule 15, Federal Rules of Criminal Procedure. The motion was denied on October 31, 1977 (Reporter's Transcript ["R.T."] 35).

The case proceeded to trial on December 13, 1977, where the key—indeed, only—percipient witness against petitioner was Worley. The trial continued on December 14 and 16. Following the trial, the jury found petitioner guilty on both counts. (R.T. 406.) Judgment was entered on January 10, 1978. Petitioner was sentenced to five (5) years in the custody of the Attorney General.

An appeal (CA 78-1457) from that judgment was taken, based on the district court's denial of peti-

tioner's Rule 15 motion to obtain the deposition of Bennett.

During the pendency of petitioner's appeal in CA 78-1457, on May 5, 1978, the government advised petitioner of information that suggested that Worley had perjured herself during cross-examination. This formed the basis for petitioner's Rule 33 motion for a new trial, filed May 19, 1978. The district court denied the motion on June 19, 1978 (R.T., 6/19/78 at 16) and petitioner appealed the denial (CA 78-3303).

The conviction was affirmed by the Court of Appeals on November 13, 1978 (CA 78-1457). A petition for rehearing was timely filed on November 24, 1978, which requested that the rehearing in CA 78-1457, if granted, be consolidated with the hearing in the appeal from the denial of his new trial motion (CA 78-3303). That petition was denied on January 4, 1979.

On January 17, 1979, the Court of Appeals issued an order recalling the judgment in CA 78-1457 as prematurely issued and staying its issuance pending the disposition of petitioner's appeal in CA 78-3303 or until further order of the Court. That order is printed and attached hereto and made a part hereof as Appendix "D".

The district court's denial of petitioner's new trial motion was vacated by the Court of Appeals on September 27, 1979, and the cause remanded for further proceedings because of the district court's failure to make findings sufficiently clear to enable the Court of Appeals to review his denial for possible abuse of discretion (CA 78-3303). In its two-to-one decision,

however, the majority endorsed the "probability" test for determining such a motion which the district court had applied in the first instance and to which petitioner then took issue and continues to take issue.

Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc* in CA 78-3303, which was denied—again, two-to-one—on November 20, 1979, and from which review by this Court is hereby sought.

Statement of Facts.

The essence of the indictment upon which petitioner was tried was that petitioner and the others entered into an agreement in Los Angeles pursuant to which Bennett traveled to Bangkok to obtain heroin. Thereafter, Worley traveled to Bangkok to pick up the heroin from Bennett and smuggled the heroin into the United States. The import of Worley's testimony was that petitioner was a principal instigator of the conspiracy and that Worley was acting as petitioner's agent in traveling to and from Bangkok.

Worley testified that petitioner asked her to go to Bangkok to pick up and bring back some "stuff," which she understood to mean cocaine, and that after she agreed petitioner sent her to Bangkok to meet Bennett. In that regard she testified that when she got to Bangkok "I told Gary [Bennett] that Larry [Krasny] had sent me. He told me that he had a feeling that it was going to be me" (R.T. 70), indicating that Bennett was not surprised to see her and thereby implying that petitioner was deeply involved in the heroin smuggling operation from its inception.

Worley testified that before the trip she had never discussed narcotics with Bennett, that she did not take

part in narcotics transactions, and that to the extent that she accompanied Bennett on one or two of his trips to Mexico "[h]e [Bennett] was doing all the wheeling and dealing [and she merely] just went as companionship to him." (R.T. 153.) Worley also specifically denied involvement in any narcotics transactions with Bennett. (R.T. 70, 153-54, 156-57, and 176.)

On May 5, 1978, petitioner's attorney was advised by Assistant United States Attorney Mark Geraghty, the prosecutor in charge of the case, that subsequent to the trial Worley received a letter from Bennett in which Bennett referred to having sent certain packages to Worley in the past. He further advised that upon interview, Worley stated that the packages which Bennett had sent her were packages of heroin which she assisted in distributing in the United States.

Based upon this new evidence of perjury, petitioner moved the district court for a new trial pursuant to Rule 33. At the conclusion of the June 19, 1978 hearing on the motion, the district court denied it and petitioner timely prosecuted this appeal (CA 78-3303). In passing upon petitioner's motion, the district court applied the so-called "probability" test, despite petitioner's objection thereto. (R.T., 6/19/78 at 13-14.)

At trial there was evidence indicating a pre-existing commercial arrangement between Bennett and Worley, which did not include petitioner. Thus, Worley had obtained a passport at Bennett's direction and had a bank account in hers and Bennett's name specifically at a bank with branch offices in Hong Kong, Bangkok and Los Angeles. Worley was the *only* witness called by the government who testified to having any conversation with petitioner concerning narcotics transactions. Her testimony attributed to petitioner prior knowledge of and willful participation in the illegal activities in whch Bennett and she engaged. By her testimony alone the prosecution sought to establish the element of intent required for conviction.

At trial petitioner testified that he had never had any dealings with either Bennett or Worley with respect to heroin, but that after he learned that they were dealing in heroin he was coerced into agreeing to assist Worley in the delivery of a package of heroin. His defense of duress and her accusation of prior, willful participation on his part were contradictory and wholly incompatible.

The newly discovered evidence proved that Worley was lying when she testified, since she had been receiving heroin from Bennett and distributing it in the United States prior to her visit to Bennett in Bangkok. It was not merely impeaching; rather, the newly discovered evidence went to substantive elements of the crimes for which petitioner was indicted, and demonstrated that her testimony to the effect that petitioner was a principal moving force behind the scheme was false, as was her testimony to the effect that she had never discussed narcotics traffic with Bennett prior to her trip to Bangkok.

REASONS FOR GRANTING THE WRIT.

Rule 19, Rules of the Supreme Court of the United States, "while neither controlling nor fully measuring the court's discretion, indicate[s] the character of reasons which will be considered" by this Court where review is sought on a writ of certiorari. Rule 19 provides in pertinent part that among such considerations are the following:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court. . . ."

Petitioner respectfully submits that the above considerations apply with particular force in this instance for the following reasons: (1) the issue here involved is one which arises with considerable frequency in the prosecution of criminal cases; (2) the majority's ruling places the Court of Appeals for the Ninth Circuit in a *minority of two* circuits which, since 1975, have rejected the standard adopted and applied by *all the other circuits* which have considered and decided the issue for over half a century; (3) the significant split among the circuits that now prevails due to the Ninth Circuit's decision adopting the standard of *United States v. Stofsky,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), renders this an appropriate issue for review at this time by the Supreme Court on a writ of certiorari; and (4) the rationale of this Court's decisions in *Mesarosh v. United States,*

352 U.S. 1 (1956) and its progeny apply with equal force to the facts of the instant case and dictate that the majority test (first set forth in *Larrison v. United States,* 24 F.2d 82 [7th Cir. 1928]) be firmly and finally endorsed by this Court.

Consequently, granting of the instant petition is particularly appropriate at this time under the considerations of this Court's Rule 19 previously set forth: first, the decision of the Ninth Circuit is in clear conflict with those of every other circuit except the Second Circuit; second, the issue involves an important question of federal law in the uniform and proper functioning of the criminal justice system which has not been squarely faced and settled by this Court (at least, so the majority of the Ninth Circuit panel in CA 78-3303 apparently concludes); and third, if petitioner and the dissenting judge are correct, the Ninth Circuit has decided the question here presented in a way in conflict with applicable decisions of this Court.

A. The Larrison Test Applied by the Majority of Circuits Is Most Appropriate in Resolving Rule 33 Motions Based on Newly Discovered Evidence of Perjury by a Key Government Witness and Is Mandated by This Court's Prior Decisions.

(1) Where Perjury of a Key Government Witness Is Involved, Defendant Need Only Show a Possibility of Acquittal in Order to Obtain a New Trial.

Federal courts agree that there are four requisites to be met by a defendant moving for a new trial based on newly discovered evidence. Professor Moore has summarized these as follows:

> "(1) The evidence must have been discovered since the trial. (2) Failure to learn of the evidence

at the time of trial was not due to defendant's lack of diligence. (3) [The newly discovered evidence] must be material to the issues at the trial. (4) It must be of such a nature that it would *probably (or in the case of perjury, possibly)* produce an acquittal in the event of a new trial." 8A *Moore's Federal Practice* ["Moore's"] ¶ 33.03 [1] (emphasis supplied) and cases cited therein.

Only the fourth and last of these requirements is here at issue, although, as discussed below, the third is in a sense implicated. The hearing on petitioner's motion focused on the materiality of the new evidence (the district court concluding that it was merely "cumulative" and thus not material) and the standard (probable versus mere possible acquittal) properly to be applied (the court applying the former). (R.T., 6/19/78 at 16; *see id.* at 13.)

In vacating and remanding the case to the district court, the majority in CA 78-3303 ruled:

"On remand, if the district judge determines that Worley appeared to have committed perjury, he will need to consider, among other things, the importance of Worley's testimony to the government's case, the extent to which the apparently perjured testimony concerned material issues in the case, and the extent to which her credibility, as a whole, would be affected by the revelation to the jury of this apparent perjury. Based upon this analysis, the district judge will be able to make a finding as to whether Krasny has proved that had newly discovered evidence been presented during the trial, the jury probably would have acquitted him.

Because we cannot properly evaluate the district court's exercise of discretion, we vacate and remand the case so that the district judge can make the necessary findings."

The majority adopted the following formulation of the "probability" test:

" 'Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.' *United States v. Stofsky, supra,* 527 F.2d at 246. As *Stofsky* persuasively argued, the witness' credibility could very well have been as important to the jury as the factual elements of the perjured testimony. *See id.*"

The dissent eloquently argued not only that the *Larrison* "possibility" test *should* apply, based upon the "conviction that newly discovered evidence of trial perjury by a material government witness should not be treated in the same manner as other post-conviction revelations," but also that the decisions of this Court *require* such test to be applied. (*See* Section C., *infra.*)

(2) Where This Court Disagrees With the District and Circuit Courts' Conclusions as to the Legal Effect of the New Evidence, It May Dispense With Remand and Order a New Trial.

Where perjury of a government witness is alleged, the district court in the first instance must resolve the factual issue by affidavit or otherwise. If the court determines that the witness did not in fact commit

perjury, the appellate court will not upset that finding unless entirely unsupported by the evidence. However, if the trial court finds that a material witness did indeed commit perjury, and without his testimony the jury *might* not have convicted, a new trial is necessary. Moore's ¶ 33.06[1]; *Larrison v. United States,* 24 F.2d 82, 87 (7th Cir. 1928).

In this instance, the district court failed to make any finding with respect to Worley's perjury. While the government urged that her post-trial statements were "to a large extent . . . not revelation, not new evidence, but an elaboration of her testimony" (R.T., 6/19/78 at 12), the district court made no finding on this crucial issue. Rather, the court concluded that "the suggested new evidence is at best cumulative and would not be of sufficient import to alter the jury's determination in this matter in terms of guilt or innocence. The motion for a new trial is denied." (R.T., 6/19/78 at 16.)

It is respectfully submitted that there is a clear distinction between a finding that new evidence is cumulative and a finding that a prosecution witness committed perjury during cross-examination. While, as will be discussed shortly, petitioner vehemently disagrees with the district court's characterization of that evidence as cumulative (and thus not material), nevertheless it was abundantly evident at the hearing that *no one disputed the fact that Worley lied during her cross-examination* because (according to Assistant United States Attorney Geraghty, who quizzed her on her suppression) "she didn't feel it was any of his [appellant's attorney's] business." (R.T., 6/19/78 at 10; *see id.* at 4-5 and 9). The remand ordered in CA 78-3303,

as noted, requires this threshold determination, but, if perjury is found, requires the district court to determine whether the jury—if it had before it the evidence not only of the true facts but also of Worley's prior perjury—would *probably* have returned an acquittal.

As this Court has stated, where an appellate court disagrees with the district court's legal conclusion(s) regarding the *effect* of the new evidence, as petitioner respectfully urges this Court should in this instance, remand may be dispensed with and a new trial ordered by that court. *Remmer v. United States,* 350 U.S. 377, 76 S.Ct. 425 (1956) (the case having returned to the Court following an earlier remand); *Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1 (1956); *see* Moore's ¶ 33.03[4].

(3) The Undisputed Evidence of Worley's Perjury Is Material as a Matter of Law in This Instance.

The new evidence of Worley's perjury is material since the test of materiality is whether the new evidence "*could have* induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v. Miller,* 411 F.2d 825 (2d Cir. 1969). If it *could have* induced a reasonable doubt then it is *material* evidence. Certainly, where the key government witness was engaged in narcotics transactions with Bennett before the transaction in question and lied about it, that could induce a reasonable doubt as to her veracity when she denied involvement in the instant transaction and sought to put off the blame on petitioner.

As Professor Moore quite properly notes:

> "The traditional test of motions for a new trial based on newly discovered evidence refers separately to the requirement of materiality and to the

requirement that the new evidence must be of such nature that it would probably produce an acquittal in the event of retrial. The latter requirement, however, is simply another means of testing materiality and should analytically be assimilated to that inquiry. So analyzed, it is easier to reconcile the cases dealing with perjury of a witness or post-trial recantation, to which a looser standard is usually applied, *viz* that the new evidence (of perjury or recantation) *might* have produced a different verdict. Since the ultimate question is whether the new evidence 'could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction,' it follows that *the testimony of a principal government witness inherently possesses a high degree of materiality*." Moore's ¶ 33.04[1] (first emphasis original; second emphasis supplied; footnotes omitted).

Because, despite Professor Moore's penetrating observation, the cases and the remand ordered in CA 78-3303 have separated the materiality from the effect (in the sense of probable versus possible acquittal) of the new evidence, petitioner will follow this practice of distillation, although some confusion occurred during the hearing precisely on this point (*see* R.T., 6/19/78 at 12-13.)

Since it was Worley's testimony which attributed to petitioner a foreknowledge of the unlawful scheme and his willing participation in it, and as she was the *only* government witness produced on that issue, it follows that any question as to her credibility is highly material. If the principal government witness were not believed, the jury would be faced with far

different facts than those with which it was presented. *Cf. Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1 (1956).

Worley's testimony respecting her past nonactivity in narcotics traffic suggested a lack of criminal sophistication that was clearly impeached by the newly discovered evidence that she had on prior occasions been a willing and active participant with Bennett in heroin smuggling. Worley has admitted prior involvement with an apparently sophisticated importation scheme in which she and Bennett *alone* engaged.

As this Court noted in *Mesarosh v. United States,* 352 U.S. 1, 77 S.Ct. 1 (1956), where the trial was had before a jury:

> "[T]he District Judge is not the proper agency to determine that there is sufficient evidence at the trial other than that given by [the perjurious witness] to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." 352 U.S. at 12.

The Court concluded:

> "[The witness] by his testimony has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a Federal Criminal Case, and this Court has supervisory jurisdiction over the proceedings of the Federal Court. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should

be remedied at the earliest opportunity." *Id.* at 14.[1]

The government has urged that there was evidence other than Worley's testimony which was presented to the jury to obtain petitioner's conviction. Thus, in its "Response to Defendant's Motion for a New Trial," the prosecution argued that "it is the tapes, not Mr. [sic] Worley, which are the most incriminating evidence against Mr. Krasny." (C.R. 84.) Apparently the district court concurred, as indicated by his asking petitioner's counsel if he did not agree that "the question of the creditability of Mrs. Worley, although important, pales to insignificance when compared to the import and damaging aspects of the four tape recordings." (R.T., 6/19/78 at 6.)

---

[1]Although the government has sought to minimize the significance of *Mesarosh* on the grounds that that case did not involve a motion for a new trial under Rule 33 (Clerk's Record ["C.R."] 88), and the majority opinion below adopts respondent's position on this issue, apparently Professor Moore disagrees as to its significance; for he devotes six pages of his seven-page discussion of "Perjury of Government Witnesses" under Rule 33 to a discussion of the *Mesarosh* case. Moore's ¶ 33.06[1].

Moreover, a careful reading of this Court's opinion reveals that the reference to Rule 33 was made to distinguish the facts presented in *Mesarosh* from the situation where newly discovered evidence merely affects the witness' *credibility*. As the Court quite properly noted:

> "Such an allegation by the defense [that 'untruthful statements by a Government witness subsequent to the trial . . . affecting his credibility at the trial'] ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often repeated statement of the courts, an adequate basis for the grant of a new trial." 352 U.S. at 9.

As was argued in petitioner's briefs in CA 78-3033, and as will be discussed shortly, the district court's characterization of the newly discovered evidence as merely "cumulative" is erroneous as a matter of law.

The government's argument (and its apparent adoption by the district court) ignores the critical fact that Worley was the only witness who attributed guilty knowledge and uncoerced participation, in a word, intent, to petitioner. The four taped telephone calls between petitioner (in Los Angeles) and Worley (in Honolulu) indicate that *at the time they were made and possibly for some indeterminate time hitherto* petitioner had knowledge of the illicit activities of Bennett, Worley, and Jay Hathcock ("Hathcock"), an associate of Bennett's. *But all four phone calls occurred on September 1st—and petitioner's knowledge on that date or shortly before is as consistent with his claim of coerced participation as it is with the prosecution's claim of prior knowledge and acquiescence in the smuggling activities.*

There was testimony by petitioner that while in Hawaii on business during the last week of August, he spoke with Bennett (who was in Bangkok) and, upon his (petitioner's) refusal to meet Worley in Honolulu and assure that she safely transport "the stuff" to Los Angeles, was told by Bennett to call Hathcock (who was in Los Angeles). When petitioner called Hathcock and reiterated his refusal to get involved, Hathcock made threats to petitioner and his immediate family (who, like Hathcock, were in Los Angeles)—threats that were repeated upon petitioner's return to Los Angeles and which formed the basis for his defense of duress.

The prosecution's claim that "even without the testimony of Gloria Worley, Mr. Krasny would have been convicted" because of his purported failure to establish a legally sufficient defense of duress (because of his alleged failure to produce evidence that the threats

from Hathcock were "immediate with no chances of escape") (C.R. 87) is disingenuous. The new evidence of Worley's perjury upon cross-examination creates *two new facts* which the jury never knew about: first, that she was an active participant, and had been for some time prior to August, 1977, with Bennett (apparently to the exclusion of petitioner); and, second, that she was willing to lie under oath in order to conceal the first fact.[2]

The reason this evidence is so critical to petitioner's receiving a fair trial is that without her testimony the prosecution almost certainly would have been unable to succeed in its attempt to show (1) that petitioner and Bennett were somehow the masterminds of this conspiracy and (2) that Worley, while hardly an innocent participant, nevertheless in this escapade (as in Bennett's earlier sorties into Mexico with her "com-

---

[2]This latter aspect has been held to be a factor which a court should assume the jury would have had before it in assessing the nature (probable or possible acquittal value) of the newly-discovered evidence. *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975):

> "Put another way, should we, in determining whether truthful testimony by the witness would probably have changed the jury's verdict, also assume that the jury would have known that he had lied under oath about the matter? Since the witness's credibility could very well have been a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself, see *Giglio v. United States, supra*, 405 U.S. at 154, 92 S.Ct. 763; *Napue v. Illinois, supra*, 360 U.S. at 269, 79 S.Ct. 1173; *United States v. Seijo, supra*, 514 F.2d at 1363-64, we would answer this question in the affirmative. Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness."

The majority in CA 78-3303 endorsed this feature of the *Stofsky* test.

panionship") occupied a relatively peripheral status, was deliberately kept in semi-ignorance of the nature of the activities, and was relegated to the lowly position of a semi-hysterical, none-too-reliable, novice courier.

With her own sentencing for her participation in the smuggling pending at the time of her testimony, she clearly had every motive to minimize her role and lay the blame off on petitioner. *If Worley were to be believed (i.e., petitioner, along with Bennett, occupied a principal role), then petitioner's defense of duress, ipso facto, could not possibly be believed by the jury.* On the other hand, were petitioner able to have presented the newly-discovered evidence of her perjury to the jury, and were the jury to conclude that petitioner, and not Worley, occupied (and had all along occupied) a peripheral role in Bennett's drug activities, petitioner's coercion defense would have been credible.

Thus, it is a misconception to characterize (as did the district court) Worley's perjury as merely "cumulative." While admittedly the evidence has tremendous impeachment value, it is probative of the substantive factual elements of the government's case. Put another way, neither the district court nor the Court of Appeals were or are in a position to determine whether the jury ever reached or fully considered petitioner's coercion defense—but were and are nevertheless fully capable of recognizing that whether or not they did would presumably be informed by whether they believed petitioner to be a principal instigator or merely a recent participant in a scheme concocted by Bennett (and possibly Worley herself). *And the only evidence upon this issue, including the tapes, was the testimony of Gloria Worley.*

As noted by this Court in *Mesarosh, supra*, where there has been perjury by a key government witness, there must be a retrial.

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. at 9.

See also Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 76 S.Ct. 663 (1956), where the record established that three prosecution witnesses had committed perjury in testifying in another proceeding distinct from the one under review, in which they had also testified. The Court found that even though the witnesses had committed perjury *in another proceeding,* it could be assumed that the witnesses had also perjured themselves in the case under review, noting that "it does not remove the taint for a review in Court to find that there is ample innocent testimony to support the Board's findings." 351 U.S. at 124.

In short, where there was tainted testimony offered by the government, its case is not saved because there was other independent evidence introduced against the defendant. Thus is it here. The government's case having been tainted, it may not point to non-tainted evidence probative of other elements of its case in an attempt to sustain the conviction of petitioner. The only appropriate remedy is to re-try the case.

(4) The Majority Rule Should Be Adopted by This Court.

As noted earlier, where the new evidence consists of the perjury of a prosecution witness (particularly a key or, as in this instance, the sole percipient prosecution witness), the courts traditionally have not required probable, but merely possible, acquittal in determining whether a new trial is required.

In *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), the Second Circuit became a minority of one in applying the probability standard in determining whether perjury by a Government witness calls for a new trial. 527 F.2d at 246. The court recognized that

> "[w]hile the *Berry* [*v. Georgia,* 10 Ga. 511, 527 (1851)] 'probability' standard . . . generally governs challenges to a previous trial based upon newly-discovered evidence, a less stringent test has frequently been voiced in response to revelations of perjury. Under that test, which appears to have at its original in *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928), a new trial will be granted if, without the false testimony, the jury 'might have reached a different conclusion.'
>
> "Most circuits have expressed their allegiance to *Larrison.*[9] See generally 8A Moore's Federal Practice §§ 33.04(1) & 33.06(1)." *Id.* at 245.

In Footnote 9, the court cited seven examples, one each from the District of Columbia, First, Third, Fourth, Fifth, Seventh, and Tenth Circuits—all adopting the *Larrison* "might have" (or "possible acquittal") standard. It cited no cases contra.

> *See, e.g., United States v. Anderson,* 165 U.S. App.D.C. 390, 509 F.2d 312, 327 n.105 (1974) (dicta), *cert. denied,* 420 U.S. 991, 95 S.Ct. 1427, 43 L.Ed.2d 672 (1975); *United States v. Johnson,* 487 F.2d 1278, 1279 (4th Cir. 1973) (government witness recanted testimony); *United States v. Meyers,* 484 F.2d 113, 116 (3d Cir. 1973)

(applying *Larrison* to perjury by material witness); *United States v. Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 688 (1973); *United States v. Curran*, 465 F.2d 260, 264 (7th Cir. 1972) (dicta); *United States v. Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971); *United States v. Smith*, 433 F.2d 149, 151 (5th Cir. 1970).

Id. at 145 n.9. *See also United States v. Robinson*, 585 F.2d 274 (7th Cir. 1978) (*en banc*) (question not decided); *United States v. Gabriel*, 597 F.2d 95, 98-99 (7th Cir. 1979); *United States v. Jackson*, 579 F.2d 553, 557 (10th Cir. 1978) (question not de- Cir. 1976); *LaFever, Inc. v. All-Star Ins. Corp.*, 571 Cir. 1976); *LaFever, Inc. v. All-Star Ins. Corp.*, 571 F.2d 1367 (5th Cir. 1978), citing *Martin v. United States*, 17 F.2d 973 (5th Cir.), *cert. denied*, 275 U.S. 527 (1927) and *Newman v. United States*, 238 F.2d 861 (5th Cir. 1956); *United States v. Maclin*, 561 F.2d 958, 961 (D.C. Cir. 1977) (question not decided); *United States v. Hamilton*, 559 F.2d 1370, 1374 (5th Cir. 1970) (question not decided); *In Re United States*, 565 F.2d 172 (1st Cir. 1977) (question not decided); *United States v. Runge*, 593 F.2d 66, 74 (8th Cir. 1979).

It should be noted that *Stofsky* was itself decided by a three-judge panel, and that prior decisions of the Second Circuit have either adopted the *Larrison* "possibility" standard, *e.g., United States Ex Rel. Sostre v. Festa*, 513 F.2d 1313, 1317 (2d Cir. 1975) (habeas corpus proceeding), or strongly suggested it is the proper standard in cases of false testimony by a government

witness, *e.g., United States v. Miller*, 411 F.2d 825, 830 (2d Cir. 1969), citing *Kyle v. United States*, 297 F.2d 507, 512 (2d Cir. 1961) (Friendly, J.).[3]

As previously discussed, the "requirement [that the new evidence be of such nature that it would probably or, in the case of perjury, possibly produce an acquittal] is simply another means of testing materiality and should

---

[3]The government's opposition to petitioner's new trial motion in the district court recognized the majority rule and, while recognizing that no Ninth Circuit case had addressed this issue, nevertheless suggested that *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976), implicitly adopted the more stringent "probable acquittal" standard by its approving citation of *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975).

Brashier involved appeal from the denial of appellant Coughlan's motion for a new trial, which had been based on purportedly newly-discovered evidence of (1) the testimony of Brashier, another appellant (co-defendant) and (2) the alleged perjury of Rhoads, a prosecution witness, in a separate trial. In affirming the district court's denial of the motion, the Ninth Circuit noted:

> "Brashier's expected testimony was known at the time of trial and argued as part of Coughlan's motion to sever [i.e., was not 'newly-discovered' as required by the first of Professor Moore's four requisites]. As previously indicated this testimony would have been cumulative and would not have produced an acquittal.
>
> "The alleged Rhoad's perjury is new evidence, but no showing has been made that any admission or determination of perjury exists. Evidence which may impeach a government witness, although discovered after trial, is not enough without a greater showing that a new trial is required under the standard articulated in [*United States v.*] *Cervantes* [542 F.2d 773, 779 (9th Cir. 1976)]. ["See generally" citations, including *Stofsky*, omitted.]" 548 F.2d at 1327.

Not only did the Ninth Circuit not expressly adopt the *Stofsky* probability standard, but *Brashier* is clearly distinguishable on its facts. First, the alleged perjury occurred in a separate trial. Second, the evidence was found to have merely a possible impeachment value. Finally, no showing was made that perjury in fact occurred.

Of far greater significance to this Court is the implicit recognition of the need for flexibility suggested by the Ninth Circuit's reference to the insufficiency of appellant's evidence "without a greater showing that a new trial is required."

analytically be assimilated to that inquiry." Moore's ¶ 33.04[1].

In effect, as the *Stofsky* court itself recognized (527 F.2d at 245-47), courts apply a sliding scale which, despite the limits of the language in which the requirements are couched, takes account of the nature of the newly-discovered evidence and its potential impact on the case. Thus, where the newly-discovered evidence consists of perjury by a government witness, a lesser showing of materiality is required; and where the newly discovered evidence consists not merely of perjury by a government witness, but perjury by a *key* government witness, this and other courts express their recognition that "the waters of justice [have been] polluted" and that the "dignity of the United States Government will not permit the conviction of any person on [such] tainted testimony" (*Mesarosh v. United States, supra,* 352 U.S. at 14 and 12) by requiring merely that the new evidence *might have* resulted in an acquittal had it been presented to the jury.[4]

It is clear therefore, that all prerequisites for granting of the motion exist in the instant case. More importantly, it is clear that when the standards of *Mesarosh, Subversive Activities Control Board,* and *Larrison* are applied, this Court is compelled by the per-

[4]It should be noted that *Stofsky* is factually distinguishable from the instant case in at least one crucial aspect: in *Stofsky*, there were numerous witnesses called by the prosecution (during the course of the two-week trial) whose testimony was found by the district court to substantially corroborate the challenged testimony of one of the government's key witnesses. Indeed, the district court concluded that the new evidence based on the witness' failure to testify truthfully as to the full amount of bribes and kickbacks he had received as middleman in defendants' labor racketeering scheme would have "implicated the defendants even further in the illegal scheme." 527 F.2d at 242.

suasive force of its prior holdings to grant the instant petition and conclude that the "possibility" standard be applied by the district court in its determination of petitioner's motion in order that a new jury, one which will have a full understanding, not only of the degree of Worley's prior involvement with Bennett and non-involvement with petitioner, but also of Worley's prior perjurious testimony, will have an opportunity to newly review all the evidence.

B. The Ninth Circuit Majority Opinion Fails to Give Due Regard to Certain Salutary Features of the Larrison Test and to the Decisions of This Court in Virtually Indistinguishable Cases.

In its opinion, the majority of the panel notes that "the correct standard for granting a new trial when newly-discovered evidence reveals that *a* government witness *may* have committed perjury during the trial" is one of first impression in that Circuit. (Emphases supplied.)[5] After (1) reciting the "probability" test generally applied to new trial motions based on newly-discovered evidence (with which petitioner takes no exception) and (2) recognizing that the vast majority of circuits that have considered the precise issue before it in the context of perjury by a government witness have "modified" the "probability" standard so as to require a showing that acquittal "might or possibly would result" were the newly-discovered evidence (including the fact of perjury) placed before the jury, nevertheless, the majority embraces *Stofsky,* which it concedes "severely criticized the *Larrison* standard."

[5]As previously noted, this is more accurately characterized as a case in which *the* key and *sole* percipient government witness perjured herself; and the perjury went to a crucial element of the offense.

The majority bases its decision primarily on the grounds that (a) "the test, *if literally applied,* should require reversal in cases of perjury with respect to even minor matters" (527 F.2d at 245) (emphasis supplied)[6] and that (b) in spite of its "speculative nature," frequently courts "have not hesitated to deny new trials in cases where they have purported to apply it" (*id.* at 246).[7]

[6]The "literal" application argument is a pivotal flaw in *Stofsky* and, by extension, in the majority's opinion. If taken seriously, then the test that *both* the Ninth Circuit *and* the Second Circuit apply in cases of knowing or negligent use by the prosecution of false testimony must similarly be rejected, for that test requires a new trial "if [there is] any reasonable likelihood that the false testimony *could* have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1977)." *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978). *Accord: United States v. Mele*, 462 F.2d 918 (2d Cir. 1972). The argument that, in theory, the *Larrison* standard requires a new trial in every case because it is always "possible" that the newly-discovered evidence of perjury by a government witness (even as to minor peripheral matters) "might" have produced an acquittal is disingenuous. The test, properly applied, requires not only that the government witness committing perjury be a "material" witness but also that the perjury relate to a "material" matter. It is often noted that newly-discovered evidence which is "merely cumulative or impeaching" does not mandate a new trial.

Moreover, it should be noted that in his seminal opinion in *Kyle v. United States*, 297 F.2d 507 (2d Cir. 1961), Judge Friendly endorsed the same common sense approach to the meaning to be given the "possibility" test as petitioner asserts: namely,

> "that 'might' [have produced an acquittal] means something more than an outside chance although much less than the 'would probably' [have produced an acquittal] of the [traditional] rule [applied to Rule 33 motions that do not involve perjury by a government witness].

Id. at 512.

[7]Moreover, the *Larrison* test is no more "speculative" than *either* the above-noted test (*see* footnote 6, *supra*) *or* the test the *Stofsky* court itself embraced (requiring, as it does, that the trial court include in its assessment of the "probable" impact of the perjury vis-a-vis guilt or acquittal, the impact of the fact of the perjury itself as well as the impact of the truth, had it been known by the jury). Indeed, a district court in the Third Circuit, applying that Circuit's *Larrison* rule

In rejecting *Larrison,* the panel emphasized that "there is no sure method of determining the weight of the perjured testimony. But there is similarly no certainty in evaluating the weight which *any* newly-discovered evidence would have on a jury's deliberations." Additionally, the majority states that it cannot perceive of "any effective difference between perjured testimony and other new evidence . . . the focus of the inquiry is on what difference the evidence would have made to the trial, regardless of its source."

In assuming such a literalist approach to the *Larrison* test, and in concluding that not "all cases involving some perjured testimony *necessarily* require new trials" (emphasis original), the majority seemingly concludes that the logic of the *Larrison* rule mandates the granting of a new trial in *every* case in which a government witness fails to testify truthfully. In so reasoning, the majority ignores the materiality element of the test. Moreover, to be consistent, the majority should not limit its holdings to cases where "the government did not knowingly or negligently use the perjured testimony." (*See* footnote 6, *supra.*)

Taken to *its* logical extreme, the majority prompts one to ask: What difference should the government's willful or negligent malfeasance make? It is small comfort to a defendant convicted on the basis of perjured testimony of a key witness the government chose

(*see United States v. Meyers*, 484 F.2d 113 (3d Cir. 1973)), utilized *Stofsky* to *enlarge* the *Larrison* rule "to allow the trial judge to consider the effect on the verdict of a disclosure to the jury of false testimony by key government agents." *United States v. Willis*, 467 F.Supp. 1111, 1113 (N.D. Pa. 1979). Thus, the court included in its consideration "the potential impact of the fact of perjury by government witnesses on the jury's estimate of their credibility, instead of limiting its consideration to what the verdict might have been if the agents had testified truthfully." *Id.*

to use that the prosecutor did not know that the witness was testifying falsely. But, of course, the cases clearly recognize the difference, as petitioner and the dissent agree they should. *See, e.g., United States v. Dipp,* 581 F.2d 1323, 1327 (9th Cir. 1978) (where prosecutorial suppression is deliberate, new trial should be granted if the evidence is material and "if [there is] any reasonable likelihood that the false testimony could have affected the judgment of the jury"); *United States v. Mele,* 462 F.2d 918 (2d Cir. 1972). *See,* 2 Wright, *Federal Practice and Procedure,* §557, at 524 (and cases cited). Professor Wright notes: "If the motion does not allege knowledge by the prosecutor, and rests only on the grounds that testimony at the trial was false, what is known as the "*Larrison*" rule applies." *Id.* at 525. *Accord:* 8A Moore's *Federal Practice* ¶ 33.06[1].

The majority concludes: "When a key witness recants his or her testimony in its entirety, where the bulk of a key witness' testimony is otherwise shown to be false, a district court may well find it probable that an acquittal would result on retrial, and may not so find when a rather inconsequential witness has prevaricated on a minor or collateral issue. A *per se* rule is not required."

In support of the above proposition, the majority notes that Professor Moore considers that two of the traditional prerequisites for prevailing on a motion for a new trial based upon newly-discovered evidence—that is, that (1) the newly-discovered evidence be *material* and that (2) it *probably* would produce an acquittal on retrial—are really two means of measuring the same thing. But Professor Moore himself harmonizes the *Larrison* rule based on this view, observing: "Since

the open question is whether the new evidence 'could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction' it follows that the testimony of a *principal* government witness inherently possesses a high degree of materiality." Moore at ¶ 33.04[1]. Moreover, the *Larrison* rule is *not* a *per se* rule; like so many other rules, it merely serves to flag a major difference or distinction in the nature of the new evidence. (*See* footnotes 6, *supra,* and 8, *infra.*)

The decision in *Stofsky* was *not* the result of the Second Circuit's belief that perjury should be handled in the same fashion as other newly-discovered evidence (which is what the majority's decision seemingly concludes), but rather was based on that court's concern that the less stringent *Larrison* test *might be literally applied* in cases where the perjury was with respect to *minor* or *only peripherally relevant* matters. 527 F.2d at 245-46. Implicit in *both* the view of the vast majority of circuits and commentators (adopting the *Larrison* test) *and* the Second Circuit's view announced in *Stofsky,* is the realization that a finding that perjury has occurred leads to institutional considerations not present in other newly-discovered evidence cases.[8] The

---

[8]An analogous instance of an institutional willingness to establish a different standard, difficult though it may be in application, which recognizes differences in the *nature* of events, is the "strict scrutiny" standard applied in equal protection cases. Whereas the general rule of review of state action seeks "any rational relation" between the end sought and the means utilized, where "fundamental rights" or "suspect classifications" are involved, the reviewing court applies "strict scrutiny" to the state action. In so doing, the burden shifts to the state, as it should, to show the existence of a "compelling state interest" in the ends sought and no "less restrictive alternative" in the means chosen.

The analogy is suggestive in the present context: for, while the *Larrison* test does not shift the burden to the state to show the perjury would not have made a difference, it properly

(This footnote is continued on next page)

dissent in CA 78-3303 properly recognizes this feature of the instant proceedings.

Petitioner respectfully submits that the majority opinion below misapprehends the significance of the *nature* of the newly-discovered evidence when it states that the "focus of the inquiry is on what difference the evidence would have made to the trial, regardless of its source." The prosecution chose to seek petitioner's conviction based on the testimony of one key witness (who, at the time of her testimony, was herself awaiting sentencing) and it similarly chose not to take steps to produce or permit petitioner to depose Bennett (incarcerated in Thailand), the purported leader of the conspirators.

C. The Dissent Correctly Sets Forth the Proper Standard and Should Be Adopted by This Court as Dictated by Its Prior Decisions.

As the dissent convincingly argues, the *Larrison* standard is not merely "the more appropriate standard when, as here, the chief prosecution witness recants material portions of her trial testimony," but is "required by the teaching of *Mesarosh v. United States,* 352 U.S. 1 (1956). . . . *See Williams v. United States,* 500 F.2d 105 (9th Cir. 1974). *Cf. Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115, 124 (1956); *McNabb v. United States,* 318 U.S. 332, 340-41 (1943)." *See also United States v. Chisum,* 436 F.2d 645 (9th Cir. 1971).

---

eases the defendant's otherwise virtually insurmountable burden in appropriate cases. As previously noted, it is small consolation to petitioner to know that the government did not intend its key (and indeed, *sole* percipient) witness to perjure herself.

This Court noted the conflict in the standards some 33 years ago, but determined that it "need not consider what criteria should have guided the [district] court in passing on the motion" for a new trial, based on its decision that "the District Court's finding, that [the government witness'] testimony was not shown to have been false, [was] not reviewable." *United States v. Johnson,* 327 U.S. 106, 111 n.5, 66 S.Ct. 464, 466 n.5 (1946).

Petitioner respectfully submits that *Mesarosh* (decided a decade later) and its progeny have answered the question left open in *Johnson.*

While the majority of the panel distinguishes *Mesarosh* on the grounds that this Court there noted that it was not addressing a Rule 33 new trial motion, a close reading of the opinion reveals that the reference to Rule 33 was limited to the context of such motions based on new evidence which is "merely cumulative or impeaching." Thus, the Court stated:

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, . . . presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, *because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial.*"

352 U.S. at 9 (emphasis supplied).[9]

That Worley's testimony was not "merely cumulative or impeaching" was skillfully and succinctly summarized by the dissent.

> "The recanting witness in this case, Worley, was the Government's chief witness providing testimony of Krasny's knowing and willful participation in the heroin smuggling conspiracy. Krasny's defense rested, essentially, upon his claim that his limited participation in the conspiracy began only after certain alleged threats had been directed against the safety of his family. Worley's trial testimony flatly contradicted Krasny's defense.
>
> "At trial, Worley painted a picture of her role in the conspiracy as merely serving as the agent of Krasny and as never having been involved in past drug dealings with co-conspirator Bennett. It was Worley who testified that Krasny was one of the principals in the conspiracy, downplaying her own role. Tapes of telephone conversations with Krasny offered at trial corroborate Worley's story. But, the post-trial revelations, consisting of admissions made by Worley to government agents that she had in fact been heavily involved in narcotics trafficking with Bennett in the past, severely discredited Worley's trial testimony and lend new credence to Krasny's explanation of the taped telephone conversations."

---

[9]Apparently, the dissent is not alone in perceiving the applicability of *Mesarosh* to the facts of this case. As previously noted, Professor Moore devotes six pages of his seven-page of discussion "Perjury of Government Witnesses" under Rule 33 to a discussion of *Mesarosh* case. Moore's ¶ 33.06[1]. (*See* footnote 1, *supra*).

In *Williams*, the Ninth Circuit, following the teaching of *Mesarosh*, ordered a new trial where a government narcotics agent (Watson) was himself indicted for, and pleaded guilty to, perjury in connection with a wholly separate matter. The court characterized Watson's guilty plea as raising "serious questions about the degree to which Williams' conviction is tainted by the use of Watson's testimony." 500 F.2d at 106. Finding it necessary to consider carefully the role that Watson's testimony played at Williams' trial, the court ordered a new trial even though Watson's testimony served merely to corroborate that of the government's chief witness (another undercover narcotics agent). Finding *Mesarosh* applicable, the court concluded:

> "Watson was an important witness in the government's case against Williams. He provided the only corroboration of Jackson's testimony that Williams was involved in the first transaction. Without his testimony, the jury *might* not have been convinced that there was enough evidence to find Williams guilty beyond a reasonable doubt. . . .
>
> ". . . Watson was the government's agent. He was charged by the government with perjury and convicted of an act perpetrated in an investigation similar in nature and contemporaneous in time to the investigation of Williams. . . . Williams is entitled to a new trial." *Id.* at 107-08 (emphasis supplied.)

Petitioner respectfully submits that the dissent is correct and the majority mistaken in their respective views of the impact of *Mesarosh* upon the instant appeal. The only noteworthy difference between *Mesarosh* and *Williams* and the case with which this Court

is faced is that in the former, there has been a formal finding or conviction of perjury on the part of a material government witness.[10] It follows from this, however, not that a different standard should be applied in determining whether a new trial is warranted *once that finding has been made,* but rather that the district court, in addressing such a motion, satisfy itself that "the testimony given by a material witness is false" (*Larrison,* 24 F.2d at 87).

Once this determination has been made, there is no reason for applying a more stringent standard than that applied where the perjury has not even been demonstrated to have occurred in defendant's trial. As this Court has eloquently stressed:

> "The dignity of the United States government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> . . .
>
> ". . . This is a Federal Criminal case, and this court has supervisory jurisdiction over the proceedings of the federal court. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition shall be remedied at the earliest opportunity."

Mesarosh, 352 U.S. at 9, 14.

D. Conclusion.

Viewed in the proper prospective, the *Larrison* standard provides a sensible middle ground between the

[10]As previously discussed, the fact that Worley lied during cross-examination is undisputed. (*See* Section A.(2), *supra*).

general test applied to newly-discovered evidence on the one hand, and the test applied where either (a) prosecutorial misconduct is involved in the knowing or negligent use of false testimony or (b) a material government witness (typically an agent or informer) is found to have committed perjury in a way which "taints" the conviction, on the other. To ignore this "time-honored" middle ground, embodying as it does both institutional and administrative considerations which the vast majority of courts and commentators have embraced, is to countenance the creation of a schism between two extremes which creates administrative and logical difficulties of its own.

For the foregoing reasons—and in particular because of the presence of those considerations in this Court's Rule 19 regarding the significant split among the circuits fostered by the opinion in CA 78-3303, the importance of the question here presented to the uniform and proper functioning of the federal criminal justice system, and the apparent conflict between the minority test and this Court's decisions in virtually indistinguishable situations, petitioner respectfully requests that the instant petition be granted so that proper guidance can be given to the federal courts faced with this common and most critical issue of a criminal defendant's right to a fair trial.

Respectfully submitted,

MANATT, PHELPS, ROTHENBERG & TUNNEY,
BRIAN J. O'NEILL,
MARC MARMARO,
LOUIS A. SPOTO,

Attorneys for Lawrence Krasny, Petitioner.

APPENDIX "A".

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Lawrence Krasny, Defendant-Appellant. No. 78-3303.

Filed: Sept. 27, 1979.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, ELY and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Krasny appeals from a district court judgment denying his motion for a new trial. He based his motion upon newly discovered evidence which purportedly demonstrates that a government witness committed perjury during his trial. Krasny argues that the district court applied an incorrect legal standard and failed to make necessary findings in ruling on his motion for a new trial. We conclude that the district judge did not apply a test that requires us to reverse. However, because his findings are insufficient to allow us to determine whether he abused his discretion, we vacate the judgment denying Krasny's motion and remand for further proceedings.

I

We earlier affirmed Krasny's conviction on charges of conspiracy to import heroin into the United States, and to possess heroin with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846, 952, 963. His conviction arose out of an alleged agreement between him and two others, Bennett and Worley, to import heroin from Bangkok into the United States.

Bennett first traveled to Bangkok to obtain the heroin. Worley followed Bennett, secured the heroin, and was arrested when she attempted to smuggle it into the United States.

After her arrest, Worley cooperated with the government and consented to the taping of conversations between her and Krasny. The government's case against Krasny rested on these conversations and the testimony of Worley. She testified that Krasny was a principal in the conspiracy, while she merely acted as his agent, traveling to Bangkok at his behest. Worley also claimed that before the trip she had never discussed the subject of narcotics with Bennett. She admitted traveling to Mexico on two occasions with Bennett, who told her that the trips were for the purpose of acquiring Narcotics. However, she denied taking part in any of these narcotics transactions, and testified that only Bennett had been involved, while she just went as his companion.

The taped conversations revealed, among other things, that Krasny had been at the airport in Honolulu to meet Worley upon her return from Bangkok, that his sole purpose in going to Honolulu may well have been to meet her, that he later planned to send someone else to meet her in Honolulu, that he had been a "nervous wreck" because Worley did not leave customs when he expected her to, that he was familiar with the customs area in Honolulu, that he had people who were "dying" to get the "stuff," and that he could pay Worley in two days, after he sold it.

Krasny's version of the events and his explanation of the phone calls differed from those of Worley. He testified that he had never before had anything to do with Worley's and Bennett's dealings in heroin.

Krasny did not deny participation in the taped phone calls. He claimed, however, that he had been coerced by threats against him and his family into agreeing to assist Worley in the delivery of the heroin. The jury obviously did not believe this defense, as it convicted Krasny for his involvement in the conspiracy.

Subsequent to Krasny's conviction, the government, with commendable candor, advised his attorney of new developments concerning Worley's trial testimony. The government discovered that Worley had, in fact, assisted Bennett to some degree in prior narcotics transactions, despite her earlier testimony to the contrary. Specifically, Worley admitted that she had mailed some packages containing cocaine on Bennett's behalf. She also stated that she had participated in a number of conversations with Bennett regarding narcotics, some in the presence of Krasny.

Worley first explained that she failed to admit, during cross-examination, her prior narcotics involvement with Bennett because it was none of Krasny's counsel's business. Subsequently, however, she apparently indicated that she did not really mean that that was the reason for her initial denial of this involvement, but the record does not reveal any other reason for her apparently erroneous testimony. In any event, the parties agree that neither the government nor Krasny knew or had reason to know of Worley's more extended involvement with Bennett in narcotics trafficking.

The district judge did not rule specifically whether he believed that Worley had perjured herself. In denying Krasny's motion for a new trial, however, he did rule that "the suggested new evidence is at best cumulative and would not be of sufficient import to alter the

jury's determination in this matter in terms of guilt or innocence."

II

Krasny's challenge to the judge's ruling on his motion raises a question of apparent first impression in this circuit. We must decide the correct standard for granting a new trial when newly discovered evidence reveals that a government witness may have committed perjury during the trial.[1]

In general, a defendant seeking a new trial on the basis of newly discovered evidence must meet the following requirements:

> "(1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would *probably* produce an acquittal."

United States v. Cervantes, 542 F.2d 773, 779 (9th Cir. 1976) (emphasis supplied) (quoting *Pitts v. United States,* 263 F.2d 808, 810 (9th Cir.), *cert. denied,* 360 U.S. 919 (1959)); *accord, e.g., United States v. Brashier,* 548 F.2d 1315, 1327 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977); *United States v. Craft,* 421 F.2d 693, 695 (9th Cir. 1970). A majority of circuits that have considered the question, however, have applied, or implied that they would apply, a modified standard when the newly discovered

[1]We have never before fully analyzed this question. *See* footnote 2.

evidence indicates that a government witness committed perjury at trial. Rather than requiring a defendant to show that an acquittal *probably* would result, these courts require only that the defendant demonstrate that an acquittal *might* or *possibly* would result upon a new trial. *See, e.g., United States v. Wallace,* 528 F.2d 863, 866 (4th Cir. 1976) (witness recantation); *United States v. Anderson,* 509 F.2d 312, 327 n.105 (D.C. Cir. 1974) (dictum), *cert. denied,* 420 U.S. 991 (1975); *United States v. Smith,* 433 F.2d 149, 151 (5th Cir. 1970) (per curiam); *Gordon v. United States,* 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied,* 339 U.S. 935 (1950); *Larrison v. United States,* 24 F.2d 82, 87 (7th Cir. 1928). *See generally* 2 C. Wright, Federal Practice and Procedure § 557, at n.24 (1969 & Supp. 1979). The "possibility" standard is often referred to as the "*Larrison* rule" because of its apparent origin in *Larrison v. United States, supra.*[2]

[2]We have cited this case just once, and then only as authority for the "probable" standard. *See United States v. Sloan,* 465 F.2d 406, 407 (9th Cir. 1972) (per curiam).

While we have employed "might" language in two cases, neither of these is dispositive of the issue before us. In *Mejia v. United States,* 291 F.2d 198 (9th Cir. 1961), the appellant had made an admission of guilt which he had unsuccessfully attempted to explain away at trial. When the appellant subsequently produced an alibi witness, we ordered a new trial, observing that "the jury might in view of [the alibi witness'] testimony, accept the appellant's story that he was a mere braggart, and not telling the truth when he asserted" that he had engaged in criminal activity. *Id.* at 201. We made it very clear, however, that we decided that case only "upon the special and peculiar facts" before us there. *Id.* at 201 n.3. No such "special and peculiar facts" are present here.

In *Strangeway v. United States,* 312 F.2d 283, 286 (9th Cir.), *cert. denied,* 373 U.S. 903 (1963), we stated: "Appellant also invokes the rule that a conviction cannot stand where the testimony of a material witness is false and without which a jury might have reached a different conclusion . . . ." We

(This footnote is continued on next page)

At times, courts have not completely endorsed this rule. Thus, courts may cite the *Larrison* rule with tacit approval, but decide that the defendant has failed to demonstrate the necessity of a new trial as judged by *either* standard, *United States v. Hamilton,* 559 F.2d 1370, 1372-73, 1374 & n.8 (5th Cir. 1977), or that the evidence merits a new trial pursuant to *either* rule, *United States v. Meyers,* 484 F.2d 113, 117 (3d Cir. 1973).

Recently, the Second Circuit severely criticized the *Larrison* standard, observing:

> [T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might" have acquitted.

United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). *Stofsky* further stated that courts following the *Larrison* approach were not troubled by its "speculative nature," and in many cases "have not hesitated to deny new trials in cases where they have purported to apply it." *Id.* at 246 (footnote omitted). The court concluded:

> "[R]ather than adopt the *Larrison* test and violate it in application, we believe, for the reasons indicated, that the time-honored "probability" standard is the more appropriate one for determining whether perjury calls for a new trial. In addition to its other virtues the rule enables a court to act forthrightly in making its determination.

Id.

We are of the opinion that the court in *Stofsky* has taken the correct path, and we agree with its reasoning. We are unpersuaded, on the other hand, by the reasoning used in justification of the *Larrison* rule. For example, the court in *Larrison* relied only upon *Martin v. United States,* 17 F.2d 973 (5th Cir.), *cert. denied,* 275 U.S. 527 (1927), which held that the cumulative nature of perjured testimony alone should not be determinative of whether a new trial is to be granted. 24 F.2d at 87. That court reasoned:

> There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown, at the time of the original trial.

17 F.2d at 976. We do not entirely disagree with this statement. Of course, there is no sure method of determining the weight of the perjured testimony. But there is similarly no certainty in evaluating the weight which *any* newly discovered evidence would have on a jury's deliberations. Yet when such grounds are presented, this is precisely the determination that courts generally make.

---

explained, however, that the case before us there did not involve any "newly-discovered evidence [tending] to show that a major witness for the prosecution had testified falsely at . . . trial," *id.* Therefore, there was no reason to adopt or reject the rule in that case. We now squarely face the question.

The court in *United States v. Johnson*, 149 F.2d 31 44 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 106 (1946), developed a different argument in favor of the *Larrison* rule. Without explaining the difference, the court suggested that, while most motions for a new trial concern the probable effect of newly discovered evidence on a future trial, motions for a new trial based upon the perjury of a government witness concern the probable effect of the perjured testimony on the first trial. We cannot see any practical difference in this distinction. *Johnson* also quoted *Pettine v. Territory of New Mexico*, 201 F. 489, 494 (8th Cir. 1912): " 'Is it clear beyond doubt that this testimony did not turn the scales against him or remove from the mind of some juror a reasonable doubt of his guilt?' " *United States v. Johnson, supra,* 149 F.2d at 44. While this query may, at first blush, appear superficially to be a valid test, the case does not suggest any effective difference between perjured testimony and other new evidence, and we can perceive of none. The focus of the inquiry is on what difference the evidence would have made to the trial, regardless of its source.

One may always ask how courts can be certain that new evidence would not create a reasonable doubt in the mind of at least one juror. Yet, we have always required a showing that the new evidence would "probably" result in an acquittal upon a new trial. We are not convinced that all cases involving some perjured testimony *necessarily* require new trials. Yet, as the court in *United States v. Stofsky, supra*, 527 F.2d at 246, observed, this is exactly where the logic of such cases as *Larrison, Martin*, and *Pettine* leads.

We are thus in agreement with *Stofsky* that the probability standard is appropriate for determining whether perjury requires a new trial, 527 F.2d at 246, at least when the government did not knowingly or negligently use the perjured testimony, *see id.* at 245. When a key witness recants his or her testimony in its entirety, or the bulk of a key witness' testimony is otherwise shown to be false, a district court may well find it probable that an acquittal would result on retrial, and may not so find when a rather inconsequential witness has prevaricated on a minor or collateral issue.[3] A per se rule is not required.

III

Krasny suggests that this view is in conflict with the teachings of the Supreme Court in *Mesarosh v. United States*, 352 U.S. 1 (1956). There, the Court had before it, on direct review, the convictions of a number of defendants for conspiracy to violate the Smith Act. The Solicitor General revealed that a key government witness had apparently testified untruthfully in the same role in other similar proceedings. The

---

[3]We find support for this view in Professor Moore's reasoning that two of the traditional prerequisites for prevailing on a motion for a new trial based upon newly discovered evidence, *i.e.*, that the newly discovered evidence be *material* and that it *probably* would produce an acquittal on retrial, are really two means of measuring the same thing. 8A J. Moore, Moore's Federal Practice ¶ 33.04[1], at 33-27 (2d ed. 1978). Professor Moore harmonizes the *Larrison* rule with this view, observing: "Since the ultimate question is whether the new evidence 'could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction,' it follows that the testimony of a principal government witness inherently possesses a high degree of materiality." *Id.* (footnotes omitted).

While it may be that "the testimony of a principal government witness inherently possesses a high degree of materiality," we do not agree that this fact calls for a different test. Rather, it is a factor naturally to be taken into account in applying the usual test.

Supreme Court, making clear that it was not ruling on a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, stated that the witness' "credibility [had] been wholly discredited," *id.* at 9, and that it would be "unreasonable" to find that "the witness . . . testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely . . . about a plan by different members of the Communist conspiracy to assassinate a United States Senator," *id.* at 13 (footnote omitted). This being so, a majority of the Court believed that a new trial was required. *Cf. Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956) ("If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited . . . .").

We have followed this approach in cases where the factual circumstances have closely paralleled those found in *Mesarosh*. *See Williams v. United States*, 500 F.2d 105 (9th Cir. 1974); *United States v. Chisum*, 436 F.2d 645 (9th Cir. 1971). We believe that the principles which guided the Court in *Mesarosh* are limited in application to those rare cases where the credibility of a key government witness has been "wholly discredited" by the witness' commission of perjury in other cases involving substantially similar subject matter. *See United States v. Stofsky, supra*, 527 F.2d at 246.

IV

We thus conclude that Krasny cannot complain about the test applied by the district judge. In finding that

the "new evidence . . would not . . . alter the jury's determination," the judge a fortiori found that it would not "probably" do so.[4]

The decision, when based upon the proper legal standard, to grant or deny a motion for a new trial based upon newly discovered evidence is within the sound discretion of the trial judge. *United States v. Craft, supra*, 421 F.2d at 695; *see, e.g., United States v. Cervantes, supra*, 542 F.2d at 779; *Pitts v. United States, supra*, 263 F.2d at 811. Krasny carries a "significant" burden to show that the district judge abused his discretion. *United States v. Brashier, supra*, 548 F.2d at 1327. While Krasny argues that the district judge did so here,[5] he also claims that the judge's failure to make a specific factual finding as to whether Worley committed perjury requires us at least to remand the case for this determination.

We are left in such doubt that we are constrained to agree that the case must be remanded. The record is insufficient for us to test fairly the determination made by the district court. Nor do we fault the district

---

[4]Moreover, a fair reading of the transcript of the hearing on the motion for a new trial makes clear that the district judge had in mind the "probable" standard.

[5]Krasny suggests that a new trial is required because if the jury believed Worley's allegedly perjured denial that she had a principal role in the narcotics transactions, as well as her testimony that painted such a role for Krasny, then the jury could not possibly have believed Krasny's duress defense. The government, in response, argues that the newly discovered evidence merely expands on *Bennett's* role in narcotics trafficking "although also showing a greater but still limited role for Worley. It does not contradict any testimony Worley gave concerning Krasny's activities." The government concludes that the district judge correctly viewed the newly discovered evidence as "merely cumulative." In view of our remand, we need not now resolve this conflict.

judge for this deficit. The law of our circuit was unclear as to what test he was to apply. In fairness and because he is in the best position to decide the issue, we believe the district judge should now be given the first opportunity to apply the test.[6]

We concur in the Second Circuit's view regarding the proper analysis of motions for a new trial which are based upon allegations that a government witness committed perjury at trial.

> Upon discovery of previous trial perjury by government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

United States v. Stofsky, supra, 527 F.2d at 246. As *Stofsky* persuasively argued, the witness' credibility could very well have been as important to the jury as the factual elements of the perjured testimony. *See id.*

On remand, if the district judge determines that Worley appeared to have committed perjury, he will need to consider, among other things, the importance of Worley's testimony to the government's case, the extent to which the apparently perjured testimony concerned material issues in the case, and the extent to which her credibility, as a whole, would be affected by the revelation to the jury of this apparent perjury.

---

[6]Thus, we do not follow the ultimate disposition made in *Stofsky*, in which the Second Circuit concluded that *it* could not "say that disclosure of [the witness'] perjury 'probably' would have produced a different verdict." 527 F.2d at 247.

Based upon this analysis, the district judge will be able to make a finding as to whether Krasny has proved that had newly discovered evidence been presented during the trial, the jury probably would have acquitted him.

Because we cannot properly evaluate the district court's exercise of discretion, we vacate and remand the case so that the district judge can make the necessary findings.

VACATED AND REMANDED.

United States v. Krasny, No. 78-3303

ELY, Circuit Judge (dissenting):

I respectfully dissent. Unlike my Brothers, I am not prepared to reject the time-honored "*Larrison*" rule in favor of the more stringent test enunciated by the Second Circuit in *United States v. Stofsky,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 439 U.S. 819 (1976). This disagreement is based upon my conviction that newly discovered evidence of trial perjury by a material government witness should not be treated in the same manner as other post-conviction revelations. *See* 8A Moore's Federal Practice ¶33.03[1] and ¶33.06[1] (2d ed. 1978).

Not only do I believe that the "might" or "possibility" standard applied by the *Larrison* line of cases[1] is the more appropriate standard when, as here, the chief prosecution witness recants material portions of her trial testimony, but I consider the application of such a test required by the teaching of *Mesarosh v. United States,* 352 U.S. 1 (1956). There, Chief Justice Warren wrote for the Court:

> [The chief prosecution witness], by his [tainted] testimony, has poisoned the water in the reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

[1]*See* cases at pages 4 and 5, *supra,* of the majority Opinion.

Id. at 14. *See Williams v. United States,* 500 F.2d 105, 107-08 (9th Cir. 1974). *Cf. Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115, 124 (1956); *McNabb v. United States,* 318 U.S. 332, 340-41 (1943).

Under the *Larrison* rule, a new trial must be granted if, on the basis of newly discovered evidence of trial perjury or recantation of trial testimony, "'(a) The court is reasonably well satisfied that the testimony given by a material witness is false [and] (b) That without it the jury *might* have reached a different conclusion.'" *United States v. Strauss,* 443 F.2d 986, 989 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971), quoting from *Larrison v. United States,* 24 F.2d 82, 87 (7th Cir. 1928).

The recanting witness in this case, Worley, was the Government's chief witness providing testimony of Krasny's knowing and willful participation in the heroin smuggling conspiracy. Krasny's defense rested, essentially, upon his claim that his limited participation in the conspiracy began only after certain alleged threats had been directed against the safety of his family. Worley's trial testimony flatly contradicted Krasny's defense.

At trial, Worley painted a picture of her role in the conspiracy as merely serving as the agent of Krasny and as never having been involved in past drug dealings with co-conspirator Bennett. It was Worley who testified that Krasny was one of the principals in the conspiracy, downplaying her own role. Tapes of telephone conversations with Krasny offered at trial corroborate Worley's story. But, the post trial revelations, consisting of admissions made by Worley to government agents that she had in fact been heavily involved in narcotics

trafficking with Bennett in the past, severely discredit Worley's trial testimony and lend new credence to Krasny's explanation of the taped telephone conversations.

In such circumstances, I conclude that the *Larrison* test has been fully met and that, under *Mesarosh*, Krasny should have been granted a new trial. The fact finder in another trial, when the true story of Worley's involvement in the drug dealings is honestly exposed, "might" well come to a different conclusion. *See Mejia v. United States*, 291 F.2d 198, 201 (9th Cir. 1961).

I would vacate the judgment of conviction and remand the cause for a new trial.

/s/ Walter Ely
United States Circuit Judge

APPENDIX "B".

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Lawrence Krasny, Defendant-Appellant. No. 78-3303.

Filed: Nov. 20, 1979.

Before: CHAMBERS, ELY and WALLACE, Circuit Judges,

The majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc; Judge Ely has voted to grant panel rehearing or, in the alternative, to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "C".

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

APPENDIX "D".

ORDER.

Recalling Judgment.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Lawrence Krasny, Appellant. No. 78-1457.

Before: CHAMBERS, ELY, and WALLACE, Circuit Judges

This Court's judgment in the subject cause was prematurely issued.

The judgment is recalled, and its issuance is stayed pending the disposition of Krasny's appeal in No. 78-3303 or until further order of the Court.